No. 91-583

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In the
Supreme Court of the United States

OCTOBER TERM, 1991

HUGH H. BOSWORTH, JR., WALTER HENNINGSEN, MELISSA HENNINGSEN, IRENE E.SCOTT and HENNINGSENS, INCORPORATED, on behalf of themselves and all other similarly situated taxpayers,
PETITIONERS

v.

TIMOTHY J. LEATHERS, Commissioner of Revenues; JIMMIE LOU FISHER LUMPKIN, Treasurer of the State of Arkansas; FLOYD G. "BUDDY" VILLINES III, County Judge, Pulaski County, Arkansas; PATRICIA TEDFORD, Treasurer, Pulaski County, Arkansas; PULASKI COUNTY, ARKANSAS; and the CITY OF FAYETTEVILLE, ARKANSAS; and all other similarly situated counties and cities; and AT&T COMMUNICATIONS OF THE SOUTHWEST, INC.; MCI TELECOMMUNICATIONS CORPORATION; U.S. SPRINT COMMUNICATIONS COMPANY; TMC OF ARKANSAS, INCORPORATED; LDDS OF ARKANSAS INCORPORATED; COMPUTE-A-CALL OF CENTRAL ARKANSAS, INCORPORATED, and all other similarly situated providers of long distance interstate and international telephone and telecommunications services,
RESPONDENTS

ARKANSAS TELEPHONE ASSOCIATION, INC.
INTERVENOR

PETITION FOR A WRIT OF CERTIORARI TO THE ARKANSAS SUPREME COURT

PETITIONERS' REPLY BRIEF TO RESPONDENTS' BRIEFS IN OPPOSITION

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REASONS FOR GRANTING THE WRIT

Briefs in Opposition to the Petition for a Writ of Certiorari were filed by the Arkansas Commissioner of Revenues (on behalf of himself and the two local governmental entities), by US Sprint Communications Company, and by LDDS of Arkansas, Incorporated. AT&T Communications of the Southwest, Inc. filed only letter responses with the Clerk. The Petitioners' responses to the points raised in each of these Briefs will be discussed below.

A. Equal Protection Clause Issue

1. Briefs of US Sprint Communications and the Commissioner of Revenues

The members of this Court should disregard US Sprint's belabored attempt to obfuscate the real conflict that exists, for Equal Protection purposes, between the decision of the Wisconsin Supreme Court in *GTE Sprint Communications v. Wisconsin Bell*, 454 N.W.2d 797 (Wis., 1990) and the decision of the Arkansas Supreme Court in this case. The exercise in "blue smoke and mirrors" engaged in by US Sprint in its brief (pp. 1–9), in citing virtually every exemption in both the Arkansas and Wisconsin Sales Tax Codes (while trying to portray a substantive difference between the classifications drawn by the challenged state Sales Tax statutes in the two cases), is not germane to the Equal Protection issue presented by the Petitioners. That question is whether the Wisconsin court applied "objective standards" (required by this Court's prior Equal Protection decisions), while the Arkansas Supreme Court failed to apply such "objective standards," and, instead, erroneously adopted a standard that it has a duty to "hypothesize" a legitimate state purpose for the questioned statute.

The only *real* difference in the facts in Wisconsin's *GTE Sprint Communications* case, and the facts in this Arkansas case, is that the discrimination between the classification of taxpayers in the Wisconsin case was between telephone companies; and, in this case, it is between telephone subscribers. In the *GTE Sprint* case, the reseller, LEC and IXC telephone companies *all* had to purchase "access services" to complete their long distance calls. The access

services purchased by IXC's were specifically subjected to Wisconsin's Sales Tax, while the purchases of the same access services by resellers and LEC's were excluded from the Wisconsin Sales Tax base. Here, the purchase of long distance interstate telephone services by MTS subscribers (represented by the Petitioners) are taxed by Arkansas, while the same long distance interstate services that are purchased by WATS and WATS-like subscribers are excluded from the Arkansas Sales Tax base. Undeniably, *both* MTS and WATS interstate long distance services use the same equipment to transmit the same voice, image or data messages. The Petitioners submit that the rather herculean attempts by US Sprint and the Commissioner (Br. 9-13 and Br. 5-9) to differentiate the facts and rationale adopted in the Wisconsin and Arkansas cases were for naught; since they are exercises that result in a distinction without a difference. [1]

In this case, the Arkansas Supreme Court simply failed to properly apply the two part rational basis test mandated by this Court's prior decisions. Instead, that court's decision has "blurred" the required application of this two part minimal scrutiny test by "hypothesizing" that there is a legitimate state purpose here by what amounts to the use of "an ends justifies the means rationale." Both US Sprint and the Commissioner have compounded the problem in their Opposition Briefs by trying to offer strained explanations to justify the holding of the Arkansas court.

To correctly apply the rational basis test, this Court's

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[1] It is most interesting to note the comparison between the Equal Protection rationale argued by US Sprint in its Brief in Opposition here, and the representations this carrier made on brief before the Wisconsin Supreme Court in the *GTE Sprint* case, when this carrier's own economic interests are differently affected. Besides establishing a competitive pricing advantage for US Sprint, AT&T and MCI in Arkansas, the provisions of § 2 of Act 27 of 1987 are also providing these carriers with a substantial cash flow from their statutorily forced collection actions, which cash flow resulted from a mere resetting of their billing computers. Why else would US Sprint (who should be a mere stakeholder in this case) try so hard to defeat the Petitioners' Equal Protection challenge?

decisions require that a state court must first determine if a legitimate state purpose is being served by the discriminatory exception in the taxing statute. *Then*, secondly, the court must determine if the classification of taxpayers created by the challenged statute is rationally or reasonably related to the legitimate state purpose determined in the first step of this test. If there is either (1) no legitimate purpose served by the statute, or (2) if the statutory classification is found palpably arbitrary and not rationally related to the legitimate state purpose, then the challenged tax statute fails the requirements of the Equal Protection Clause and must be declared unconstitutional. *Hooper v. Bernalillo County Assessor*, 472 U.S. 612 (1985); *Zobel v. Williams*, 457 U.S. 55 (1982); and *Stewart Dry Goods Co. v. Lewis*, 294 U.S. 550 (1935).

In the instant case, *both* the trial court (Pet. 24a, 51a–53a) and the Arkansas Supreme Court (Pet. 12a) correctly found (from both the face of the statute and the evidentiary record) that the classification of taxpayers created by § 2 of Act 27 of 1987 was designed to encourage the high volume use of interstate long distance telephone service. Thus, this encouragement of a high volume of use of interstate telephone service is the *only* state purpose either court found for the discriminatory classification in this questioned tax statute. The Petitioners submit that the encouragement of a high volume of interstate telephone service is *not* a legitimate state purpose (for Equal Protection/rational basis test purposes), and that these courts' inquiries should have ended there, with § 2 of Act 27 of 1987 being held unconstitutional.

However, *both* Arkansas courts then deviated from the correct application of the rational basis test, and (working backwards from the evidentiary finding that subscribers to WATS and WATS-like services were more likely than not to be businesses) held that the "purpose" of the challenged statute was to promote and encourage businesses to locate and remain in Arkansas (an admittedly legitimate state purpose). If, in fact, the encouragement of businesses to stay or locate within Arkansas was the legitimate state purpose for § 2 of Act 27 (i.e. the first part of the rational basis test); the Petitioners have steadfastly maintained

that the statute's classification of MTS and WATS subscribers totally fails the rationally or reasonably related (second part) of the rational basis test, because all *business* subscriber-taxpayers within the classification created by the statute are *not* treated the same.

All *business* subscribers to interstate telephone services are *not* treated the same by this statute, because *business* subscribers (like Petitioner Henningsens, Inc.) with a small volume need or usage of interstate long distance services are not benefitted by the tax statute's exception for WATS and WATS-like services. There is no regulatory restriction placed upon a residential subscriber's ability to use WATS and WATS-like interstate services. [2] Also, this classification between MTS and WATS service subscribers created by the Arkansas statute does not come within the lack of mathematical accuracy exception that is applicable to this second part of the rational basis test merely because it is more likely than not that a WATS service subscriber will be a business. Therefore, the Petitioners maintain that the classification created by this Arkansas tax statute is as palpably arbitrary as those classifications that were found by this Court to have violated the Equal Protection Clause's limitations in the *Hooper, Zobel* and *Stewart Dry Goods* cases.

The improper application (or lack of application) of the "objective standards" of the rational basis test by these Arkansas courts, and their adoption and use of a "subjective hypothesizing" duty to uphold the taxing statute, must be rectified by this Court's granting of this Petition for Certiorari, so that this Court can denounce such practices that directly conflict with the Wisconsin Supreme Court's proper and correct application (in its *GTE Sprint Communications* decision) of the federally mandated Equal Protec-

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[2] In fact, the Counsel of Record for the Commissioner, during oral argument before the Arkansas Supreme Court, gave only one example to justify this statutory classification; and this example involved a *residential* subscriber's use of WATS or WATS-like interstate service to stay in regular touch with a child who was attending an out-of-state college.

tion Clause standards.

Therefore, the Petitioners submit that US Sprint's characterizations of the Arkansas and Wisconsin cases as being "radically different Equal Protection challenges" (p. 13) is erroneous, and that that carrier's academic exercise in trying to classify the Wisconsin exception as a "retail-wholesale" exception, while the Arkansas statute's exception is a "policy" exception, is a distinction without difference for Equal Protection Clause analysis purposes in these two cases.

Petitioners contest the Commissioner's assertion that WATS service is a "flat rate" long distance service (p.2). WATS interstate service charges (like Private Line Service charges) were once a "flat rate" charge. However, the stipulations of the parties (R. 14) and the testimony of Mr. Carpenter, the General Manager of TMC of Arkansas (R. 225-227 and 577-582), have dispositively established in this case that though there is a monthly flat charge "associated" with WATS service, the actual charge for the usage of WATS and WATS-like services is based upon time of day, day of week, length of message and length of call; as are the charges for MTS interstate service. Further, the Petitioners submit that the Commissioner's factual assertion that calls made by WATS subscribers beyond the geographic band, and calls made by credit card or with operator assistance by WATS subscribers will all be billed as "MTS charges" (p. 2), is the best evidence that the only true difference between MTS interstate telephone service and WATS and WATS-like telephone services is the FCC and PSC approved pricing differential for these services, especially since both types of interstate service use the same equipment to transmit the same types of messages.

Also, the Commissioner has misstated to this Court the rationale adopted by the Illinois intermediate appellate court in *Satellink of Chicago, Inc. v. City of Chicago*, 523 N.E.2d 13 (Ill. App. 1 Dist., 1988), when he states (p. 7) that that court did not apply the rational basis test for Equal Protection purposes. In the *Satellink* case, the Illinois courts specifically held (423 N.E.2d, at

17): "The amendment does not withstand any Equal Protection challenge *regardless of the degree of scrutiny employed.*" Thus, it is clear that the rational basis test, as well as the heightened scrutiny test, was considered by this Illinois intermediate appellate court in reaching its decision that the taxing ordinance violated the Equal Protection Clause.

The Petitioners disagree that the question presented by their Petition is not important enough for review, as asserted by the Commissioner (pp. 9–10). This same type of disparate treatment of similarly situated taxpayers was sufficient, for Equal Protection Clause purposes, to have generated a $73.0 million refund by the Wisconsin Supreme Court in the *GTE Sprint* case, and now two other states have adopted a similar statutory pattern for imposing Sales Taxes on charges for MTS interstate service, but excepting charges for WATS and WATS-like interstate services from the same tax. This Court, in last term's decision in *Leathers v. Medlock*, 111 S. Ct. 1438 (1991), thought the disparate tax treatment of similarly situated consumers of electronic communications services was sufficiently important (for Equal Protection purposes) to specifically remand that issue to the Arkansas Supreme Court for consideration. This issue is now pending on a post-remand briefing schedule in that case. The Petitioners submit that the disparate Sales Tax treatment the Petitioners received as MTS subscribers clearly rises to the level of "invidious discrimination" that is required by this Court's prior decisions. Webster's Ninth New Collegiate Dictionary defines these terms as "to distinguish one object from another, which act would tend to cause discontent, animosity or envy." Petitioners submit that the indignation reflected by the testimony of Petitioner Irene Scott, a widowed school teacher living on a pension (see App. K, 54a, *infra*), sufficiently establishes that the discriminatory classification drawn by § 2 of Act 27 of 1987 (between MTS and WATS subscribers) has created a difference in the taxing of similarly situated citizens that has caused substantial resentment among Arkansas' taxpayers who are MTS service subscribers.

The Petitioners therefore submit that neither US Sprint nor

the Arkansas Commissioner of Revenues have submitted sufficient arguments to rebut the reasons stated in their original Petition as to why this Court should grant this Petition for Certiorari and review and reverse the erroneous application of the Equal Protection Clause standards used by the Arkansas Supreme Court in this case.

2. Brief of LDDS of Arkansas, Incorporated

LDDS, as a nonfacility based carrier that has suffered a competitive pricing disadvantage in the sale of its long distance interstate services (because of the classification created by § 2 of Act 27 of 1987), has contributed substantially to the evidentiary record in this case, through the testimony of Mr. Carpenter, its General Manager. Mr. Carpenter testified about the problems of implementing this Sales Tax (because of the ambiguous wording of the statute), as well as the competitive pricing disadvantage suffered by nonfacility based IXCs, as compared to the "facility based" IXCs, like AT&T, MCI and US Sprint. [3] The Petitioners

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[3] It is interesting to note that both AT&T and MCI, as facility based IXCs, have defaulted on the opportunity to file a Brief in Opposition in this case. However, the members of this Court should be aware that, in the Pulaski County Chancery Court, AT&T, MCI and US Sprint actually took the lead in attempting to defeat the Petitioners' constitutionally based challenge. In fact, these three facility based carriers filed a total of more than 130 pages of pleadings, motions and briefs in the trial court in an attempt to defeat the Petitioners' challenge, while all of the state and local government agencies involved filed less than 30 pages of similar materials. AT&T, MCI and US Sprint all filed briefs before the Arkansas Supreme Court attempting to defeat the Petitioners' appellate challenge. Also, AT&T's counsel utilized half of the Appellees' oral argument time before the Arkansas Supreme Court in trying to dissuade the members of that court from favorably receiving the Petitioners' challenge. Therefore, the Petitioners question why such vigorous actions have been taken by these three facility based carriers before the Arkansas courts to try to defeat the Petitioners' Equal Protection challenge (when such carriers would normally be thought of as mere "stakeholders" as "forced collectors" of the challenged tax), unless there is some vitally important economic interest (e.g. a competitive pricing advantage) that all of these "facility based carriers" are seeking to protect by having the constitutionality of § 2 of Act 27 of 1987 upheld.

submit that the representations of LDDS provide further reason why the members of this Court should review this important constitutional question presented by their Petition.

B. Due Process Clause Issue

Only the Commissioner of Revenues has addressed the second question raised by the Petitioners involving the denial of their Due Process rights guaranteed by the Fourteenth Amendment. This situation was created by Governor Clinton's special appointment of a "majority" of the members of the Arkansas Supreme Court who then passed upon the Petitioners' constitutional challenge to the Governor's own "administration bill."

Initially, the Petitioners maintain that the Commissioner's assertion (pp. 16–17) that the Arkansas Supreme Court's orders of December 10, 1990, and April 15, 1991 (denying the Petitioners' motions to remit or to recuse) were final and appealable orders is totally erroneous. Though the Due Process question here arose at the Arkansas Supreme Court level (rather than at the trial court), the same rationale regarding the lack of finality of decisions on motions to recuse by trial judges is equally applicable here. The nearly universal rule in this area of the law is that a judicial official's orders denying recusal motions are reviewable *only* after a final judgment has been rendered on the merits of the substantive issue presented. For an exhaustive annotation of decisions on this point, see the compilation of cases contained in the *Review of Federal Judges Grant or Denial of Motion to Recuse*, 64 A.L.R. Fed. 433. For this Court to accept the procedural position proffered by the Commissioner on this issue would create a situation where there is total uncertainty for litigants as to when they must file Petitions for Certiorari. This Court would, therefore, be flooded with such Petitions. The provisions of 28 U.S.C. § 1257 do not even imply the standards suggested by the Arkansas Commissioner, and such suggestion as to final orders also runs afoul of

the rationale of this Court's Rule 13.1 and 13.4. Therefore, the Petitioners maintain that this legal position taken by the Commissioner is meritless and should be disregarded by the members of this Court in their consideration of this important Due Process issue.

The Commissioner's limitation of the rationale of this Court's "fair opportunity to challenge" standard, declared in the Court's recent decision in *McKesson Corp. v. Division of Alcoholic Beverages & Tobacco*, 110 S. Ct. 2238 (1990) is unnecessarily restrictive and erroneous. This Court has previously held that "due process is flexible and calls for such procedural projections as the particular situation demands" (*Matthews v. Eldredge*, 424 U.S. 319 at 334 (1976)). The Petitioners submit this concept guarantees that they have a fair opportunity to be heard by an appellate panel of justices who are free from even the appearance of impropriety.

The procedural record in this case clearly establishes that Act 27 of 1987 was an "administration bill" sponsored by Governor Clinton and his staff in the 1987 regular session of the Arkansas General Assembly. When Governor Clinton was presented with the direct conflict of interest in appointing the majority of the court that was to pass upon the constitutionality of § 2 of Act 27 of 1987, the Petitioners presented their timely objections based upon the violation of their Due Process rights and presented either three or four separate procedures that were available to Governor Clinton (at least a *de facto* litigant in this case) to avoid this constitutional crisis. However, neither the Governor nor the "elected" members of the Arkansas court chose to exercise those options. Thus, the appointment of these special justices by Governor Clinton created a situation that brought the independence of the judiciary seriously into question and threatened the separation of powers required by the state constitution.

Finally, the Commissioner mistakenly or erroneously restates (p. 21) the "general rule" set forth in Canon 3C(1) of the Arkansas Code of Judicial Conduct, regarding the obligation of the special "appointed" justices of the state court to recuse when a

question was raised on a reasonable ("objective") basis as to their impartiality or possible personal bias or prejudice in this case. The Petitioners have cited the contemporaneously recorded comments of the Reporter of the ABA Committee that promulgated this 1972 Code, regarding this "general rule" of Canon 3C in their Petition (Pet. p. 28, ftnt. 15) which states that the justices should recuse under this "general rule." Accordingly, as former Justice Black stated in *In Re Murchison*, 349 U.S. 133, at 136 (1955): "to perform its high function in the best way, justice must satisfy the appearance of justice." Even the "appearance of impropriety," as set out in Canon 2 of the Arkansas Code of Judicial Conduct, should have clearly provided these special "appointed" justices with sufficient reason to have honored the Petitioner's request that they recuse.

Therefore, the Petitioners submit that they have presented an important Due Process question that can only be resolved by this Court's exercise of its general supervisory powers over the state (as well as the lower federal) courts, so as to assure the Petitioners that they have a "fair and objective panel" to review their Equal Protection challenge to § 2 of Act 27 of 1987.

CONCLUSION

For the reasons set forth in this Reply Brief, as well as their original Petition, the Petitioners submit that this Court should grant their Petition and answer the important Equal Protection and Due Process questions presented in this case.

Respectfully submitted,

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APPENDIX K

TRIAL TRANSCRIPT (R. 420–422, and 508)

(Transcript of questions and answers by Petitioner Irene Scott regarding her reasons for being a representative party in this class action suit)

MR. SAYRE: And would you tell the Court why you are a plaintiff in this lawsuit?

MRS. SCOTT: Yes. I'm just representing the typical residential user. I'm a widow and I have a pension, and so I have to kind of watch my funds. And people that I have met in clubs and things that I belong to, they haven't been, you know, noticing that they were paying the tax either, and they really got upset when I told them that that's what was happening.

* * *

MR. SAYRE: By bringing this challenge to the sales tax, are you in any way trying to knock out the exclusion and extend the tax to those types of services?

MRS. SCOTT: No, I just feel that the tax is not fair.

* * *

MR. SAYRE: Mrs. Scott, why have you filed this claim and solicited these claims from the other four hundred and twenty-five claimants?

MRS. SCOTT: Because I think that the tax is probably illegally charged to us taxpayers that have had to pay for the out of state calls. And I also think it's unfair that 1-800 numbers didn't have to pay it.

* * *